DEC 13 1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6732

JAMES CHAFFIN,

Petitioner,

v.

LEROY STYNCHCOMBE, SHERIFF
OF FULTON COUNTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 455 F.2d 640 (1972). The Petition for Re-Hearing is reported in the opinion.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its judgment on February 8, 1972. (App. 14) The motion for re-hearing was denied on February 29, 1972. (App. 22) The order and mandate was entered on March 8, 1972 (App. 21), and the petition for certiorari was filed on May 26, 1972. The jurisdiction of the Court rests on 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution of the United States provides in part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The Fourteenth Amendment of the Constitution of the United States provides in part:

> ". . . nor shall any State deprive any person life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Georgia Code Annotated, §26-2501 provides:

> "Robbery is the wrongful, fraudulent, and violent taking of money, goods, or chattels from the person of another by force or intimidation, without the consent of the owner, or the sudden snatching, taking or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof without the consent of the owner or person in possession or control thereof."

Georgia Code Annotated, §26-2502 provides:

"Robbery by open force or violence shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment in the penitentiary for life; Provided, however, the jury in all cases may recommend that the defendant be imprisoned in the penitentiary for not less than four years nor longer than 20 years, in the discretion of the court."

Georgia Code Annotated, §26-301 provides:

"Persons who are considered of sound mind—A person shall be considered of sound mind who is neither an idiot, a lunatic, nor afflicted with insanity, and who has arrived at the age of 14 years, or before that age if such person know the distinction between good and evil."

QUESTION PRESENTED

Does the increasing of petitioner's sentence from fifteen (15) years in his first jury trial to life imprisonment on his re-trial after the accused exercised his unfettered and absolute right of appeal violate the double jeopardy provisions of the Fifth Amendment and the equal protection clause and due process clause of the Fourteenth Amendment of the United States Constitution where a different jury imposed the increased sentence and there were no special grounds set forth for the increase?

STATEMENT OF THE CASE

On January 21, 1969, James Chaffin was tried in the Fulton Superior Court, Atlanta, Georgia, upon his plea of not guilty to the charge of robbery by open force and violence in violation of Georgia Code Annotated, Section

26-2501. The jury found Chaffin guilty, and set the sentence at fifteen (15) years. The conviction and sentence was affirmed by the Georgia Supreme Court. *Chaffin v. State*, 170 S.E.2d 426 (Ga. 1969).

Thereafter he filed a writ of habeas corpus in the United States District Court, Northern District of Georgia, Atlanta Division. The District Court granted the writ on the grounds that the trial court erroneously placed the burden of proving alibi on the defendant. See *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1972).

Upon retrial for the same charge, but before a different jury, a sentence of life imprisonment was imposed by the jury. The Georgia Supreme Court affirmed the imposition of a greater sentence on retrial without requiring special grounds to justify the increased sentence. *Chaffin v. State*, 180 S.E.2d 741 (Ga. 1971).

Thereafter Chaffin again filed a writ of habeas corpus in the United States District Court alleging that the increased sentence violated his constitutional rights. (App. 4) The writ was denied (App. 11) and the Fifth Circuit affirmed, holding that the imposition of a harsher sentence by a jury on retrial did not violate Constitutional principles since the second jury did not know petitioner's previous sentence.[1]

The records of the two trials are not part of the record in this case. However, the Court of Appeals opinion (App. 15) holds that the second trial was substantially different from the first trial. This is incorrect. The defense of alibi was interposed at both trials. The evidence was exactly the same in proving the guilt of the petitioner in both trials. In the second trial, defense counsel raised the defense of insanity. Under Georgia law

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[1] *Chaffin v. Stynchcombe*, 455 F.2d 640; see also *Casias v. Beto*, 333 F. Supp. 214 (N.D. Texas 1971), affirmed 459 F.2d 54 (1972).

this affirmative defense does not deny the crime, but raises the question whether the accused had the mental capacity to distinguish between right and wrong. See Georgia Code Annotated, §26-301; *Handspike v. State*, 45 S.E.2d 662 (Ga. 1947).

ARGUMENT

The increasing of petitioner's sentence from fifteen (15) years in his first jury trial to life imprisonment on his retrial after the petitioner exercised his unfettered and absolute right of appeal violates the double jeopardy provisions of the Fifth Amendment and the equal protection clause and due process clause of the Fourteenth Amendment of the United States Constitution even where a different jury imposed the increased sentence and there were no special grounds set forth for the increase.

A. GEORGIA EXTRACTS A UNCONSTITUTIONAL PRICE WHEN THE ACCUSED EXERCISES HIS RIGHT TO APPEAL FROM THE ERRORS OF THE TRIAL COURT.

In *Salisbury v. Grimes*, 158 S.E.2d 412 (Ga. 1967), the Georgia Supreme Court held that the imposition of a greater sentence on retrial did not violate any constitutional right. The Court reasoned that since the accused asked for a new trial by his own choosing and then secured a new trial, the slate is wiped clean and a harsher sentence may be imposed. Subsequently, in *North Carolina v. Pearce*, 395 U.S. 711 (1969), it was held that a judge may not increase the sentence on retrial unless special grounds are set forth justifying the increase. The Georgia Supreme Court in *Chaffin v. State*, 180 S.E.2d 741 (Ga. 1971), was presented with the *Pearce*

case but held that since juries set the sentence in Georgia, there can be no vindictiveness in imposing a harsher sentence and therefore *Pearce* did not apply. See also *Rozier v. State*, ___ S.E.2d ___, 126 Ga. App. 336 (Ga. 1972).

There are six other states that permit juries to impose sentence, and all in accord with the Georgia Supreme Court.[2]

The Fourth Circuit[3] and three Federal District Court decisions in Tennessee[4] are in conflict with the Fifth Circuit.

These state courts seem to ignore the right of an accused to appeal his case to correct legal errors in his trial. They all point to the fact that the jury in the second trial does not know the sentence imposed in the first trial, and therefore there is no vindictiveness as was present in *North Carolina v. Pearce, supra.*

But this forces the defendant to stand pat with a short sentence, but with an error ridden trial. If he takes the choice of securing a new trial, he is faced with the threat of getting a greater sentence.

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[2] *Bruce v. Commonwealth*, 465 S.W.2d 60 (Ky. 1971); *Spidle v. State*, 446 S.W.2d 793 (Mo. 1969); *State v. Martin*, 497 P.2d 427 (Okla. 1972); *Brown v. State*, 466 S.W.2d 527 (Tenn. 1971); *Fuery v. State*, 464 S.W.2d 666 (Texas 1971); *Levin v. Payton*, 444 F.2d 525 (4th Cir. 1971) cert. denied, *Slayton v. Levine*, 404 U.S. 995 (1970) reversing a Virginia conviction which allowed an increased sentence on retrial.

[3] *Levin v. Payton* supra; *May v. Payton*, 398 F.2d 476 (4th Cir. 1970), cert. denied *Cox v. May*, 402 U.S. 948 (1971).

[4] *Pinkard v. Neil*, 311 F. Supp. 711 (M.D. Tenn., 1970); *Britt v. Tollett*, 329 F. Supp. 568 reversing *Britt v. Tollett*, 315 F. Supp. 401 (E.D. Tenn. 1971); *Pendergrass v. Neil*, 338 F. Supp. 1198 (M.D. Tenn. 1972).

Therefore one seeking to safeguard his Constitutional rights in Georgia may pay a very expensive price when he appeals his conviction.

B. *NORTH CAROLINA V. PEARCE* IS FULLY APPLICABLE

The imposition upon Chaffin of a harsher sentence after retrial for the same offense was a clear violation of the holding in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The issue presented in *Pearce*, as stated by this Court, is exactly the same as the issue in the instant case:

> "When at the behest of the defendant, a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" 395 U.S. at 713.

This Court answered the above question by stating:

> "[S]ince the fear of . . . vindictiveness may constitutionally deter a defendant's exercise of the tiring to appeal or collaterally attack his first conviction, due process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation." 395 U.S. at 725.

It seems that the Court was concerned with the discouraging effects of the accused's reasonable fears and apprehensions of a harsher sentence. Accordingly this Court made the trial judge state reasons based on objective information why an increased sentence was imposed on retrial. 395 U.S. at 725.

To affirm what the State has done to petitioner would be to discourage appeals through the implicit threat of the jury imposing a harsher sentence. If the *Pearce* decision does not apply to the instant case, since a jury imposed the sentence rather than a judge, then the

Constitutional right of appeal means much less in the seven states where a jury sets the sentence than in the remaining forty three states and the federal courts where the judge sets the sentence.

C. DUE PROCESS AND EQUAL PROTECTION PROHIBITS THE CHILLING OF THE RIGHT TO APPEAL BY THE THREAT OF AN INCREASED SENTENCE UPON RETRIAL.

Before reaching the constitutional arguments, a thought should be given to why the State is interested in having the right to increase the sentence on retrial absent any special grounds. The reason would seem to be that prosecutors or the State conceive of justice as being served only by the imposition of maximum sentences. If that were true, legislatures would not make provision for variable penalties and conscientious prosecutors would neither engage in plea bargaining or even recommend lesser penalties to judges or juries. But law can be maintained as the source of social and economic order without securing maximum penalties in all or even a substantial portion of cases. Therefore there is no public policy that would justify giving the State the right to increase the penalty on a retrial.

Turning to the due process argument, it is obvious that a threat of an increased sentence chills the Constititional right of appeal.

This Court has held that once avenues of appellate review are established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois,* (351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Draper v. Washington*, 372 U.S. 487 (1963); *Rinaldi v. Yeoger*, 384

U.S. 305 (1966); *Eskridge v. Washington State Board*, 357 U.S. 214 (1958); *Williams v. Oklahoma City*, 395 U.S. 458 (1969). If a defendant receives the maximum sentence or near the maximum, he would appeal since he would have very little or nothing to lose. But a defendant who receives a minimum sentence or a sentence close to the minimum would not appeal since the chances of an increased sentence on retrial, if found guilty, would be greater. The right of appeal would really depend on whether the accused was willing to play "Russian Roulette" with his freedom. An appeal then becomes a game of chance.

This is like the "grisly choice" discountenanced in *Fay v. Noia*, 372 U.S. 391 (1963). "The law should not and in our judgment does not, place the defendant in such an incredible 'dilema' ". *Green v. United States*, 355 U.S. 184 (1958).

The only Supreme Court case dealing with increasing punishment by a jury is *Stroud v. United States*, 251 U.S. 15 (1919). In *Stroud* the defendant received a life sentence for first degree murder, and after securing a reversal was retried and sentenced to death. This court affirmed. *United States v. Ball*, 163 U.S. 662 (1896), would also seem to indicate that once the slate is wiped open, there is no bar to the imposition of a sentence greater than that originally imposed.

This Court's decision in *Furnam v. Georgia*, 408 U.S. 238 (1972) may bar the death penalty, but the principle in *Stroud* has never been overturned. Now is the time to give the *Stroud* decision its proper burial, and hold that a State may not seek a greater sentence on retrial even where the jury sets the sentence.

Four states do not allow the death sentence on retrial where the accused received a life sentence at his first trial. *People v. Henderson*, 386 P.2d 677 (Cal. 1963);

Roberson v. The State, 258 So.2d 257 (Fla. 1971); *State v. Hatten*, 188 N.W.2d 846 (Neb. 1972); *State v. Wolf*, 216 A.2d 586 (N.J. 1966). Cf. *State v. Kneeskern*, 210 N.W. 465 (Iowa 1926); *State v. Morgan*, 82 So. 711 (La. 1919); *Commonwealth v. Arsenault, Jr.*, 280 N.E.2d 129 (Mass. 1972).

In *Jackson v. United States*, 390 U.S. 570, 581 (1968), it is stated:

> "Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than *to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it would be patently unconstitutional*."

The threat inherent in the exercise of such a punitive policy in *Jackson* is substantially the very same threat inherent in the exercise of such a punitive policy in the instant case.

This punitive policy is similar to coercing a guilty plea. See *Herman v. Claudy*, 350 U.S. 16 (1954).

In *Lawrence v. Henderson*, 318 F.Supp. 230 (E.D. Louisiana, 1970) the Court found that a verbal threat by the prosecutor that he would try the accused on a multiple bill so the accused would be facing thirty (30) years rather than twelve (12) years if he was successful on his appeal caused the accused to withdraw his appeal. The Court then concluded that the defendant was denied his Constitutional right of appeal because of the threat.

Under the facts of the present case, there is a continuing threat by the prosecutor that if the accused is successful on appeal the State will go for an increased sentence.

The only difference between Georgia's policy of increased sentence on retrial and *Lawrence v. Henderson*, supra, is that the threat in the former is implied while the threat in the latter is expressed.

D. INCREASING THE PENALTY ON RETRIAL VIOLATES THE PROHIBITION AGAINST DOUBLE JEOPARDY.

In *North Carolina v. Pearce*, 395 U.S. 711, the Court rejected the assertion that the Fourteenth Amendment due process protection from double jeopardy protects against increased penalty at the retrial. The Court relied on a line of cases, commencing with *United States v. Ball*, 163 U.S. 662 and *Stroud v. United States*, 251 U.S. 15, in which the Court had previously rejected the double joepardy protection as a barrier either to retrial of a defendant whose conviction was set aside due to error, or to imposition of a greater penalty on the second trial. 395 U.S. at 720-21. Justices Douglas, Harlan and Marshall would have found the double jeopardy protection violated in *Pearce*. 395 U.S. at 727, 745. Even if double jeopardy was not a proper barrier to an increased penalty in *Pearce*, it is such a barrier here. In the instant case, the second trial is an exposure to jeopardy forced upon the defendant as the price for securing a new trial.

To allow the punishment from the first trial to be enhanced at the second trial is to penalize the defendant for the state's failure to provide an initial fair trial. But, the concept of the double joepardy safeguard encompasses protecting a defendant from the state receiving two bites at the apple. *Downum v. United States*, 372 U.S. 734, 736 (1963); *Green v. United States*, 355 U.S.

184, 190 (1958); *Benton v. Maryland,* 395 U.S. 784, 796-97 (1969). Hence the double jeopardy clause bars increased penalties upon retrial.

Moreover, the line of reasoning pursued by Mr. Justice Harlan in Pearce is fully applicable in the present situation respecting double jeopardy. In his separate opinion in *Pearce,* Mr. Justice Harlan noted that the double jeopardy rule was recognized in *Green v. United States,* 355 U.S. 184, to bar retrying a defendant on remand for a greater offense than the highest offense for which he was convicted at the first trial. Applying the reasoning of *Green,* Mr. Justice Harlan pointed out that the merits for protecting against jeopardy for a harsher offense on retrial are equally applicable respecting the imposition of a harsher penalty on retrial. 395 U.S. at 746. Further, as Mr. Justice Harlan stated: "It cannot be that the [double jeopardy] provision does not comprehend 'sentences'—as distinguished from 'offenses'—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one." 395 U.S. at 747.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit be vacated and the case remanded

for a new trial as to sentence only. See *Johnson v. Smith*, 182 S.E.2d 101 (Ga. 1971); *Horton v. State*, 187 S.E.2d 677 (Ga. 1972).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Glenn Zell, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Brief of Petitioner on Respondent by depositing copies of the same in a United States mail box, with first class postage prepaid, addressed to counsel of record at their post office addresses:

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This __ day of December, 1972.

GLENN ZELL